

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
PHILLIP SMITH, et al.,  
Defendants.

Case No. 2:11-cr-00058-JAD-CWH

## **ORDER**

This matter is before the Court on Defendant's *Ex Parte* Motion for Rule 17 Subpoenas (#163), filed September 9, 2014, and Defendant's *Ex Parte* Motion for Competency Examination (#164), filed September 12, 2014. By way of these motions, Defendant Phillip Smith requests *ex parte* consideration of his request for a subpoena pursuant to Fed. R. Crim. P. 17(c) and his request for a competency examination. The Court has reviewed the motions and finds that *ex parte* consideration is not appropriate for either motion.

## 1. Defendant's *Ex Parte* Motion for Subpoena (#163)

Though Defendant indicates this motion is brought pursuant to Fed. R. Crim. P. 17(b) and (c), it is a request issuance of a subpoena *duces tecum* and properly considered under the standards of Fed. R. Crim. P. 17(c). The standards governing the issuance of subpoenas *duces tecum* under Fed. R. Crim. P. 17(c) were analyzed recently in *United States v. Sellers*, 275 F.R.D. 620 (D. Nev. 2011). Rule 17, in pertinent part, provides:

1 A subpoena may order the witness to produce any books, papers, documents, data,  
 2 or other objects the subpoena designates. The court may direct the witness to  
 3 produce the designated items in court before trial or before they are to be offered  
 in evidence. When the items arrive, the court may permit the parties and their  
 attorneys to inspect all or part of them.

4 Fed. R. Crim. P. 17(c)(1). Courts have discretion to direct that a subpoena *duces tecum* be made  
 5 returnable before trial.<sup>1</sup> Nevertheless, the law is clear that Rule 17 is not a discovery device. *See*  
 6 *e.g.*, *United States v. Nixon*, 418 U.S. 683, 689 (1974); *see also Sellers*, 275 F.R.D. at 622-23  
 7 (collecting cases). As noted in *Sellers*, “Leave of court is required for a pretrial subpoena *duces*  
 8 *tecum*.” *Id.* at 623 (citation omitted). The Supreme Court has stated that “[e]nforcement of a  
 9 pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial  
 10 court since the necessity for the subpoena most often turns upon a determination of factual issues.”  
 11 *Nixon*, 418 U.S. at 702.

12 The moving party bears the burden of showing good cause for the requested pretrial  
 13 production. Generally, courts look to the factors first identified in *United States v. Iozia*, 13 F.R.D.  
 14 335 (S.D.N.Y. 1952) for guidance in determining whether pretrial production is appropriate. *See*  
 15 *Nixon*, 418 U.S. at 699. The *Iozia* standard requires a showing: (1) that the documents are  
 16 evidentiary and relevant; (2) that the documents are not otherwise procurable reasonably in advance  
 17 of trial by exercise of due diligence; (3) that the defendant cannot properly prepare for trial without  
 18 production in advance of trial and that failure to obtain the documents may unreasonably delay the  
 19 trial; and (4) that the application is made in good faith and not intended as a fishing expedition.  
 20 *Nixon*, 418 U.S. at 699-700 (citing *United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952)).

21  
 22  
 23  
 24 <sup>1</sup> The issuance of subpoenas returnable at trial for those who are unable to pay for them is governed by  
 25 Fed. R. Crim. P. 17(a). Rule 17(b) describes the procedure for defendants unable to pay the requisite witness  
 26 fees. Rule 17(b) also permits an *ex parte* application requesting the issuance of subpoenas. Courts authorize the  
 27 issuance of a subpoena to a defendant who is unable to pay “if the defendant shows an inability to pay the  
 28 witness’s fees and the necessity of the witness’s presence for an adequate defense.” Fed. R. Crim. P. 17(b).  
 “Although prior judicial authorization is required, the *ex parte* nature of a Rule 17(b) application serves to put a  
 defendant on equal footing with the Government because the Government is not required to give a defendant  
 notice as to those witnesses that it intends to subpoena to testify at trial.” *Sellers*, 275 F.R.D. at 622 (citing  
*United States v. Reyes*, 162 F.R.D. 468, 469 (S.D.N.Y. 1995)).

1       Against the backdrop of *Ioza*, the Supreme Court identified “three hurdles” that a moving  
 2 party must clear in order to carry his burden: relevancy, admissibility, and specificity. *Nixon*, 418  
 3 U.S. at 700. The moving party must “show the evidentiary nature of the requested materials ....”  
 4 *United States v. Skedaddle* 178 F.R.D. 167, 168 (N.D. Ohio 1996). Conclusory allegations of  
 5 relevance or admissibility are not sufficient. *Sellers*, 275 F.R.D. at 623-24 (citations omitted).  
 6 Documents requested in a Rule 17(c) subpoena must have more than some potential relevance or  
 7 evidentiary use, there must be a sufficient likelihood that the requested material is relevant to the  
 8 offenses charged in the indictment. *Id.* at 624 (citing *Nixon*, 418 U.S. at 700). The specificity  
 9 requirement “ensures that the subpoenas are used only to secure for trial certain documents or  
 10 sharply defined groups of documents.” *Id.* (quoting *United States v. Jackson*, 155 F.R.D. 664, 667  
 11 (D. Kan. 1994)). Requiring specificity also protects against Rule 17(c) subpoenas being used  
 12 improperly to engage in fishing expeditions. *Id.* (citation omitted).

13       The court in *Sellers* also addressed the issue of whether Rule 17(c) allows for an *ex parte*  
 14 application for pretrial production by indigent defendants. Contrary to Rule 17(b), the language of  
 15 Rule 17(c) does not expressly allow for pretrial production by an indigent defendant. *Id.* at 624-25.  
 16 This Court agrees with the conclusion in *Sellers* that an indigent defendant should be permitted to  
 17 make an *ex parte* application under Rule 17(c) under limited circumstances, “such as where  
 18 identification of the source of evidence potentially imperils the source or integrity of evidence; or  
 19 where notice of a subpoena *duces tecum* would compromise defense counsel’s strategy; or where a  
 20 constitutional interest of a defendant is implicated.” *Id.* at 625; *see also Reyes*, 162 F.R.D. at 470  
 21 (noting the strong policy reasons in favor of an *ex parte* procedure). This Court further agrees that  
 22 allowing for an *ex parte* application for a Rule 17(c) subpoena *duces tecum* does not entitle the  
 23 defendant to strategic advantage or tactical surprise. Rule 17(c)(1) is clear that “[t]he court may  
 24 direct the witness to produce the designated items in court before trial or before they are offered in  
 25 evidence” and “may permit the parties and their attorneys to inspect all or part of them.” Fed. R.  
 26 Crim. P. 17(c)(1).

27       The Court has reviewed the *ex parte* application for a Rule 17(c) subpoena *duces tecum* in  
 28 this case and declines to consider it on an *ex parte* basis. Defendant’s desire to obtain the requested

1 information has long been known to the Government and was the subject of a recently filed motion  
2 to compel (#143), which was denied. *See* Mins. of Proceedings (#159). There is no risk  
3 identification of the source would potentially impair the source or integrity of the evidence. There  
4 is no risk that notice of the subpoena would compromise defense counsel's strategy or mental  
5 impressions. Consequently, the Court will require that Defendant's counsel serve a copy of the  
6 motion on the Government, who will have until September 23, 2014 to file its response. The reply,  
7 if any, shall be filed by September 26, 2014.

8 **2. Defendant's *Ex Parte* Motion for Competency Examination (#164)**

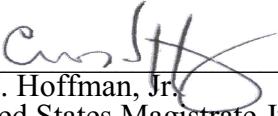
9 The Court also declines to consider Defendant's motion for competency examination on an  
10 *ex parte* basis. In support of the request, Defendant cited to Local Criminal Rule 47-2, which  
11 requires “[a]ll *ex parte* motions . . . contain a statement showing good cause why the matter was  
12 submitted to the Court without notice to all parties[.]” Defendant's counsel's generalized concern  
13 regarding the competency of his client and the Fifth Amendment are not sufficient. The statutes  
14 and rules cited by Defendant do not support consideration on an *ex parte* basis either. There is no  
15 indication in the motion that Defendant has given the requisite notice under Fed. R. Crim. P.  
16 12.2(b). To the extent the report attached to the motion will be used at trial, the Government is  
17 entitled to it under Rule 16(b)(1)(C). To the extent the motion requests an examination under 18  
18 U.S.C. § 4241, there is no basis to preclude the Government from filing a response challenging  
19 whether there is “reasonable cause to believe that the defendant may presently be suffering from a  
20 mental disease or defect rendering him mentally incompetent to the extent he is unable to  
21 understand the nature and consequences of the proceedings against him or to assist properly in his  
22 defense.” 18 U.S.C. § 4241(a). Consequently, Defendant shall serve a copy of the motion on the  
23 Government. The Government shall have until September 23, 2014, to file its response. The reply,  
24 if any, shall be filed by September 26, 2014.

25 Based on the foregoing and good cause appearing therefore,

26 **IT IS HEREBY ORDERED** that Defendant's *Ex Parte* Motion for Rule 17 Subpoenas  
27 (#163) and Defendant's *Ex Parte* Motion for Competency Examination (#164) **will not be**  
28 **considered on an *ex parte* basis.** Defendant's counsel is instructed to serve a copy of the motions

1 on the Government not later than September 15, 2014. The Government shall have until  
2 September 23, 2014 to file its response. Any reply shall be filed by September 26, 2014.

3 DATED: September 16, 2014.

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5 C.W. Hoffman, Jr.  
6 United States Magistrate Judge